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NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

This case involves the facial validity of a Virginia statutory amendment barring the commercial display of pornography where children can examine and peruse it. The court of appeals' use of the facial overbreath doctrine to invalidate Virginia's display Amendment renders the State's authority to regulate the sale of such material to children meaningless, despite its validation by this Court in *Ginsburg* v. *New York*, 390 US. 629 (1968). *See American Booksellers Ass'n, Inc.* v. *Rendell*, 481 A.2d 919, 942 (Pa. Super 1984).

The decision below has also created a conflict in the federal circuits. *Compare Upper Midwest Booksellers* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S.*

News Co. v. *Casado*, 721 F.2d 1281 (10th Cir. 1983); (*See* Minneapolis Amicus Brief). And it has potential widespread impact on the numerous states and localities across the nation with display provisions of one form or another. (Georgia *et al* Amicus Brief).

ARGUMENT IN REPLY

Booksellers assert that there is no *Ginsburg* issue in this case, but their arguments consistently reveal that their real complaint is with *Ginsburg's* concept of "variable obscenity," not with Virginia's amendment. They argue, for example, that the Amendment completely bars all pornographic material not fit for children, thus violating the rule of *Butler* v. *Michigan*, 352 U.S. 380 (1957). This same argument was advanced in *Ginsburg* and rejected. 390 U.S. at 634.

They also contend that Virginia's display provision "presumes" that whatever is harmful for a young child is also harmful for an older one, but the Amendment has nothing to do with what is "harmful" for *any* child: "harmful to juveniles" is defined in Va. Code § 18.2-390, not the Amendment. This fifteen year old statute tracks the language validated in *Ginsburg*. Once again, the Appellees' argument is with the variable obscenity doctrine, not the Amendment.

Booksellers' further contention that the Amendment is violated by just having proscribed material in a store is simply rhetoric: the Amendment's scienter requirement makes a merchant liable only if she *knowingly* places such material where a child can *examine and peruse* it; if the pornography is not so knowingly placed, the Amendment is not violated. Virginia recognizes that "[i]t is not innocent

but *calculated* purveyance of filth which is exorcised. . . ." *Ginsburg*, 390 U.S. at 644.[1]

Ironically, Booksellers' overstated argument clarifies the Fourth Circuit's erroneous use of the facial overbreath doctrine. Appellees hypothesized below, as they do here, a worst case scenario of the Amendment's scope, but this Court has "never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. . . ." *New York* v. *Ferber*, 458 U.S. 747, 772 (1982). Any concern the Fourth Circuit had about the Amendment's potential overbreath should have been resolved through an *applied* overbreath analysis when and if the situation ever actually arose, allowing arguably impermissible applications to be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broaderick* v. *Oklahoma*, 413 U.S. 601, 615-16 (1973).

Due to Booksellers' preemptive attack on the Amendment, no Virginia court has ever had the opportunity even to construe its language, much less narrow it. Virginia suggested several ways the Amendment could be narrowed if necessary. So long as a limiting construction may be placed on a challenged provision, it is not facially overbroad. *Broaderick*, 413 U.S. at 613.[2]

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[1] Virginia did *not* concede below that just having Jackie Collins' *Hollywood Wives* on a store's premises would be a misdemeanor: Virginia simply stated that of Booksellers' sixteen exhibits, *Hollywood Wives* was the only one that might possibly even be considered "harmful to juveniles" under the statute. (Virginia's Fourth Cir. Br. at 25). And Virginia expressly disputed Booksellers' assertion that just having a proscribed book in a store violated the Amendment. (Virginia's Fourth Cir. Br. at 6).

[2] A Virginia court can narrow a statute's language without "rewriting" it. *See e.g. Price* v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974) (Supreme Court of Virginia narrowed definition of obscenity by judicial construction).

Booksellers further appear to contend that the court of appeals' invalidation of Virginia's Amendment will have little, if any, effect on other States' display provisions. Not only do Virginia's twenty-two *amici* obviously disagree with this view, Georgia's display statute has already been held unconstitutional, due in no small part to this case. *American Booksellers Ass'n, Inc.* v. *Webb*, 643 F.Supp. 1546, 1554 (N.D. Ga. 1986). Indeed, unless the Fourth Circuit's decision is reversed by this Court, it will undoubtedly be the centerpiece in a wave of piecemeal attacks on every display provision in this country.

Finally, Virginia has consistently asserted that the Amendment is a valid time, place and manner regulation. *See Renton* v. *Playtime Theatres*, 475 U.S. ___, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Upper Midwest Booksellers; M.S. News Co.* Booksellers do not dispute this contention.

CONCLUSION

Although the Appellees attempt to minimize the importance of this issue, their arguments actually highlight the substantial federal question involved and the defects in the court of appeals' decision. The Fourth Circuit's opinion conflicts with decisions of this Court, as well as with those of the Eighth and Tenth Circuits; it has a potential impact on at least twenty-eight states and numerous localities; and, it severely restricts, if not destroys, Virginia's ability to enforce the concept of variable obscenity validated by this Court in *Ginsburg*. This substantial federal question is not just worthy of this Court's full consideration. The Fourth Circuit's judgment should be summarily reversed.

Respectfully submitted,

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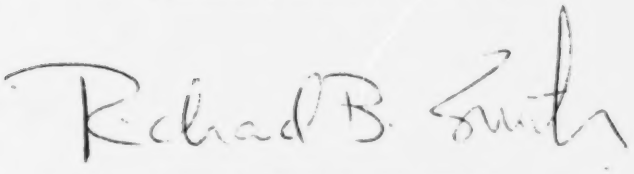

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February 6, 1987